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No. 96-651

In the Supreme Court of the United States

OCTOBER TERM, 1996

JAMES E. GILBERT, ET AL.,
Petitioners

vs.

RICHARD J. HOMAR,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the suspension without pay of a public employee always, regardless of circumstances, requires a pre-suspension hearing?

LIST OF PARTIES

The petitioners are four officials of East Stroudsburg University-part of the State System of Higher Education: President James E. Gilbert, Director of Human Resources Gerald Levanowitz; Police Chief David Marazas; and Vice-President Curtis English.

The respondent is Richard J. Homar, formerly a campus police officer and now a groundskeeper at the University.

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The opinion and order of the Court of Appeals are reported at 89 F.3d 1009 (3d Cir. 1996) and are reprinted in the Petitioners' Appendix at 1a. The Opinion and order of the district court are not reported but are reprinted in the Petitioners' Appendix at 47a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was filed on July 18, 1996, and the petition for certiorari was filed within ninety days thereafter on October 16, 1996. The Court granted certiorari by order of January 3, 1997 and has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

1. The Fourteenth Amendment's Due Process Clause provides in relevant part that "No State shall... deprive any person of life, liberty, or property, without due process of law." U.S. Const., Art. XIV, §1.

2. The regulations contained in Title 4, Sections 7.172 and 7.173 of the Pennsylvania Code provide in relevant part as follows:

§ 7.172. Definitions.

* * * * *

Employe — Individuals employed by, or appointed to serve on, an agency, board, commission or department of the Commonwealth....

Formally charged with criminal conduct — An employe shall be deemed to be formally charged with criminal conduct when he has been arrested or named as a defendant in an indictment or information or, in the case of a private complaint, the complaint has been approved by the prosecuting authority.

* * * * *

§ 7.173. Required action when an employe is formally charged with criminal conduct related to his employment with the Commonwealth or which constitutes a felony.

As soon as practicable after an employee has been formally charged with criminal conduct related to his employment with the Commonwealth or which constitutes a felony, the employe shall be suspended without pay. If the charge results in conviction in a court of law, the employe shall be terminated.

STATEMENT OF THE CASE

The issue presented is whether due process requires a public employer to provide a hearing in every instance before suspending an employee without pay. The case arises from a public employee's challenge to his discipline following his arrest on drug charges. The petitioners are four officials of East Stroudsburg University, part of Pennsylvania's State System of Higher Education, President James E. Gilbert; Director of Human Resources Gerald Levanowitz; Police Chief David Marazas; and Vice-President Curtis English. J.A. 4a-5a. The respondent is Richard J. Homar, a tenured Commonwealth employee who was formerly a member of the University's police force who is now employed by the University as a groundskeeper. J.A. 5a, 39a.

1. On August 26, 1992, members of the Pennsylvania State Police arrested Homar during a drug raid at the home of a friend. J.A. 6a, 26a, 50a-51a. The State Police charged Homar with possession of marijuana, possession with intent to deliver, and criminal conspiracy, a felony. J.A. 6a, 26a. The State Police informed Chief Marazas, Homar's supervisor, of Homar's arrest and the charges against him, *id.* at 26a; and Marazas in turn told Human Resources Director Levanowitz, to whom President Gilbert had delegated authority to discipline and suspend university employees. *Id.* at 25a-26a, 61a-62a. The Pennsylvania Administrative Code, applicable to Commonwealth employees, requires that "as soon as practicable" after being charged with a felony, "the employee shall be suspended without pay." 4 Pa. Code §7.173 (1996). An employee who has been arrested is deemed "formally charged" with criminal conduct. 4 Pa. Code §7.172. If a charge results in a conviction, the Code requires that the employee be terminated. 4 Pa. Code §7.173. Therefore, Levanowitz suspended Homar wihtout pay. J.A. 27a.

Homar did not report to work that day. J.A. 53a-54a.

The next day, however, he called Chief Marazas, told him that he had been arrested, and asked whether he was suspended. *Id.* at 81a. Marazas told him that he was, and later that day delivered to Homar a letter from Levanowitz. *Id.* at 41a, 57a, 81a. The letter confirmed that Homar was suspended pending further investigation, and explained that the University's final decision in the matter would not necessarily coincide with disposition of the criminal charges against him. *Id.* at 57a.

The criminal charges against Homar were dismissed on September 1, 1992, while the University's investigation concerning him was underway. J.A. 7a, 28a, 75a-76a. At a meeting on September 11, 1992, the State Police gave Levanowitz its investigative file on Homar, called the "Supplemental Report." *Id* at 28a. The report included statements attributed to Homar that he allegedly made to the State Police shortly after his arrest. Pet. App. 4a. According to the report, Homar admitted his knowledge of drug dealing by his friend Crompton and another man named Habhab, and that he had received marijuana from Habhab for his own use while employed at the University as a police officer. *Id.*

On September 18, Levanowitz and Marazas met with Homar and his union representative. J.A. 29a, 48a. Levanowitz told Homar that he had completed his investigation and that he had received some "very serious" evidence concerning Homar from the State Police. Pet. App. 5a. Levanowitz asked Homar to detail what had happened on the day of his arrest, and Homar complied. J.A. 30a, 49a, 50a-51a. By letter dated September 23, Levanowitz demoted Homar to the position of groundskeeper. *Id.* at 30a-31a, 82a. Homar was eventually paid for the period of his suspension at the rate of a police officer. *Id.* at 33a, 52a-53a.

The next day, Homar and his union representative met with President Gilbert. J.A. 31a. Gilbert gave Homar an opportunity to respond to the charges and to Levanowitz's decision, but sustained the decision the same day. *Id.* at 32a.

2. Homar brought this action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Middle District of Pennsylvania, seeking damages and reinstatement to his former position. J.A. 3a-4a, 13a, 15a. All of Homar's claims arose under the Fourteenth Amendment's Due Process Clause. *Id.* at 12a-15a. As relevant here, Homar claimed that the petitioners' failure to give him a hearing before suspending him violated his right to procedural due process.[1] *Id.*

The District Court rejected all of Homar's claims and granted the petitioners' motion for summary judgment. Pet. App. 74a. As to Homar's suspension without pay, the District Court applied the balancing test from *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982). *Id.* at 60a. The District Court recognized that Homar had a strong private interest in continuing to receive his salary, but also held that the University had a compelling interest in preserving public confidence in law enforcement; and that under the circumstances, the likelihood of governmental error was slim. *Id.* Taking all these interests into account, and considering also that the deprivation suffered by Homar was both temporary and brief, the District Court held that postponing the hearing on Homar's suspension did not violate the Due Process Clause. Pet. App. 58a-63a.

3. A divided panel of the Court of Appeals reversed the District Court's decision on the suspension without pay issue.[2]

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[1]Homar also claimed that the hearing given to him before his demotion was procedurally inadequate; that his suspension and demotion violated his right to substantive as well as procedural due process; and that the petitioners had deprived him of protected liberty, as well as property, interests. Pet. App. 63a-73a. None of these claims is before the Court.

[2]On Homar's other claims, the Court of Appeals reversed the District Court's decision on the adequacy of the hearing given to

Pet. App. 7a-17a. The majority agreed with the District Court that

> there was a compelling governmental interest which supports [the university's] decision to suspend Homar immediately and without a hearing pending further investigation. The university has a substantial interest in maintaining public confidence in [its] police force, and Homar's arrest on drug charges certainly suffices to ensure that the university' s concerns were not baseless or unwarranted ....

Pet. App. 11a. Nevertheless, the majority held that the petitioners had violated Homar's due process rights "because he was suspended *without pay*." *Ibid* (emphasis in original).

The panel majority relied primarily on dicta from the Court's decision in *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985). In *Loudermill*, the Court discussed the possibility that a public employer might need to remove an employee immediately without hearing, and suggested that "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem *by suspending with pay*." *Id.*, at 544-45, *quoted at* Pet. App. 11a (emphasis added by the Court of Appeals). This, in the view of the panel majority, "strongly suggests that suspension without pay must be preceded by notice and an opportunity to be heard *in all instances*." *Ibid* (emphasis added).

The majority recognized that at least two other courts of appeals had considered the same language from *Loudermill* and had reached the contrary conclusion. Pet. App. 12a & n. 12,

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Homar before his demotion, and on his substantive due process claim; but affirmed the District Court on his liberty interest claim. Pet. App. 17a-27a.

citing Engdahl v. Dept. of Navy, 900 F.2d 1572 (Fed. Cir. 1990) *and Bailey v. Board of County Com'rs of Alachua County*, 956 F.2d 1112 (11th Cir. 1992). They nevertheless held that "a governmental employer may not suspend an employee without pay unless that suspension is preceded by some kind of pre-suspension hearing." Pet. App. 14a.

Judge Alito dissented from the majority's "blanket rule," Pet. App. 31a. Judge Alito relied on the Court's recognition in *Loudermill* that "[t]here are, of course, some situations in which a postdeprivation hearing will satisfy due process requirements," Pet. App. 31a, *quoting Loudermill*, 470 U.S. at 542 n.7, and on the Court's observation in *FDIC v. Mallen*, 486 U.S. 230 (1988), that

> [a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation.

Id, at 240, *quoted at* Pet. App. 29a. He would have applied the balancing test of *Logan* and other cases, and would have held that under circumstances such as those presented by this case, there is no requirement that a public employer must pay its suspended employees. Pet. App. 30a. As to the dicta from *Loudermill* relied on by the majority, Judge Alito agreed with the *Engdahl* court that the Court's language in *Loudermill*

> is merely descriptive, not normative. We agree that in the instant case, the government could have suspended with pay. Nevertheless, we cannot read *Loudermill* as holding that the government must suspend him with pay.

Pet. App. 31a, *quoting Engdahl*, 900 F.2d at 1578.

The Court granted petitioners' petition for certiorari on January 3, 1997.

SUMMARY OF ARGUMENT

1. To affirm the Court of Appeals' decision, the Court would have to abandon its settled approach to the analysis of procedural due process issues. The Court of Appeals in this case engrafted onto the Due Process Clause a *per se* rule that suspension without pay of a tenured public employee "must be preceded by notice and an opportunity to be heard in all instances," Pet. App. 11a, regardless of the length of the suspension, the exigency of the circumstances surrounding it, and the likelihood that it is warranted. In marked contrast to this approach, however, the Court has consistently refused to invest the Due Process Clause with a "fixed content unrelated to time, place and circumstances," *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); and has specifically rejected the idea that due process "always requires the State to provide a hearing prior to [an] initial deprivation," *Parratt v. Taylor*, 451 U.S. 527, 540 (1981), of either liberty or property. Rather, the Court has required a particularized balancing of the private and governmental interests at stake, the risk of error, and the probable value of additional safeguards, *see Mathews v. Eldridge*, 424 U.S. 319 (1976) — an approach which, as the Court has recognized, leaves open the possibility that in some situations, due process may not require a pre-deprivation hearing.

This approach extends to employee suspensions. In *FDIC v. Mallen*, 486 U.S. 230 (1988), the Court strongly suggested that where the interest of the government is important, the risk of error is low, and the need for action is urgent, the opportunity to be heard may be postponed until after the suspension takes effect.

Nothing in the Court's earlier decision, *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985), changes this, or requires the *per se* rule imposed by the Court of Appeals. *Loudermill* itself was a straightforward application of the

Mathews balancing test to a particular set of circumstances, and gives no indication that the Court intended to depart from *Mathews* by imposing a rigid regime on all employee disciplinary actions, regardless of circumstances. The one sentence of dicta on which the Court of Appeals relied is thus too slender a reed to support its departure from the particularized *Mathews* analysis.

2. The *Mathews* analysis, properly applied, demonstrates that this is one of the limited class of cases in which the opportunity to be heard may properly be postponed until after the deprivation. First, the private interest involved — receiving an uninterrupted paycheck — while significant, is certainly of lesser magnitude than the private interest in *Loudermill*, which involved permanent termination from employment rather than a temporary suspension. Rather, the private interest here is analogous to those involved in *Barry v. Barchi*, 443 U.S. 55 (1979), and *FDIC v. Mallen, supra*, both cases where the Court approved pre-hearing suspensions. Second, as in *Mallen*, there is substantial assurance that the respondent's suspension was not baseless or unwarranted. The petitioners were informed by the State Police that the respondent had been arrested on a felony charge, a circumstance which, under the governing regulations, required them to suspend him. Third, the respondent is himself a police officer, and the governmental interests supporting his immediate suspension are, as the Court of Appeals recognized, "compelling." Pet. App. 11a. The rule imposed by the Court of Appeals — requiring either a pre-suspension hearing or a suspension *with pay* — improperly requires the government to trade off its interests in effective law enforcement, and public confidence in its police force, against its interest in its own financial integrity.

ARGUMENT

I. The Due Process Clause Does Not Require a Public Employer Invariably to Provide a Hearing Before Suspending a Tenured Employee Without Pay.

A. The Court has consistently recognized that in limited situations, due process does not require a pre-deprivation hearing.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court considered whether the termination of social security disability benefits must be preceded by an evidentiary hearing. The Court surveyed its prior due process decisions and found that they

> underscore the truism that " '[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

424 U.S. at 334.

The Court in *Mathews* drew from its earlier decisions a frequently quoted analytical framework for determining what, if any, pre-deprivation process is required.

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable

> value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id., at 335.

The model for evaluating procedural due process claims which the Court distilled in *Mathews* has been used ever since. Whatever the nature of the interest asserted, or the end result of the Court's analysis, it has consistently used the *Mathews* test or some close variation of it. *See e.g.*, *Ingraham v. Wright*, 430 U.S. 651, 675 (1977) (imposition of corporal punishment in public schools); *Zinermon v. Burch*, 494 U.S. 113, 127 (1990) (admission to mental institution); *Connecticut v. Doehr*, 501 U.S. 1, 10 (1991) (prejudgment attachment of real estate); *United States v. James Daniel Good Real Property*, 510 U.S. 43, __, 114 S.Ct. 492, 496 (1993) (seizure of real property subject to civil forfeiture). More importantly for this case, the Court has adhered to this approach in analyzing procedural due process claims asserted by tenured public employees. *See Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542-43 (1985); *FDIC v. Mallen*, 486 U.S. 230, 242 (1988).

The hallmark of the approach summarized in *Mathews* is, of course, its flexibility to "time, place, and circumstances," *Cafeteria Workers v. McElroy*, 367 U.S. at 895 — its refusal to prescribe "inflexible procedures universally applicable to every imaginable situation." *Ibid.* Thus, for example, the denial of welfare benefits must be preceded by the opportunity for a full adversarial evidentiary hearing, *Goldberg v. Kelly*, 397 U.S. 254, 266-71 (1970); but the denial of disability benefits requires only the opportunity to review the tentative decision of the agency and the information upon which it relies, and to submit additional evidence and arguments in writing. *Mathews v. Eldridge*, 424

U.S. at 343-47. A prisoner facing revocation of good-time credits is entitled to written notice and findings, and a limited right to present witnesses and other evidence, but not confrontation, cross-examination, or counsel, *Wolff v. McDonnell*, 418 U.S. 539 (1974); while a tenured public employee facing termination is entitled only to oral notice of the charges, an explanation of the employer's evidence, and an opportunity to present his side of the story. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. at 546.

Furthermore, while "the Court usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property," *Zinermon v. Burch*, 494 U.S. at 127 (emphasis added), the rule is not invariable.

> In some circumstances ... the Court has held that a ... postdeprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process.... "[T]he necessity of quick action by the State or the impracticality of providing any predeprivation process" may mean that a postdeprivation remedy is constitutionally adequate.... "Where the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures ... are sufficiently reliable to minimize the risk of erroneous determination," a prior hearing may not be required.

Id., at 128, *quoting Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 426 (1982) and *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19 (1978) (other internal quotations and citations omitted).

> We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but

> only in "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event."

United States v. James Daniel Good Real Property, 510 U.S. at __, 114 S.Ct. at 501, *quoting Fuentes v. Shevin*, 407 U.S. 67, 82 (1972)(other internal quotations omitted).

Thus, no pre-deprivation hearing is required before the corporal punishment of a junior high school student, *Ingraham v. Wright, supra*; the random and unauthorized loss of private property in the custody of a state official, whether negligent, *Parratt v. Taylor, supra*, or intentional, *Hudson v. Palmer*, 468 U.S. 517 (1984); the suspension of a racing horse trainer's license, *Barry v. Barchi*, 443 U.S. 55 (1979); or the seizure of a yacht subject to civil forfeiture, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

Most relevant here, the Court has strongly suggested that, where the interest of the government is important, the circumstances are exigent, and the risk of error is low, the government may temporarily suspend an employee without pay, even in the absence of any prior opportunity to be heard. In *FDIC v. Mallen*, 486 U.S. 230 (1988), the president of a federally insured bank was indicted for making false statements to federal regulators and others. The Federal Deposit Insurance Corporation, pursuant to its statutory authority, issued an ex parte order finding that his continued service might "pose a threat to the interests of the bank's depositors" or "threaten to impair public confidence in the bank," and suspending him from his position pending an administrative hearing. *Id.*, at 236-38.

Mallen, who challenged the adequacy of his post-suspension hearing, "[did] not contend that he was entitled to be heard prior to the order of suspension," *id.*, at 240, but the Court nevertheless took pains to emphasize that it, too, found no need for a pre-suspension hearing. Citing its earlier decision in *Barry*

v. Barchi, supra, the Court pointed out that

> [a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation.

486 U.S. at 240. The government's interest in protecting depositors and maintaining public confidence in the banking system "is certainly as significant as the State's interest in preserving the integrity of the sport of horse racing," the interest found sufficient in *Barchi*. *Mallen*, 486 U.S. at 241. Moreover, Mallen's indictment by a grand jury, although an ex parte proceeding, provided "substantial assurance" against a "baseless or unwarranted" suspension.

> Such an ex parte finding of probable cause provides a sufficient basis for an arrest, which of course constitutes a temporary deprivation of liberty.... It should certainly be sufficient ... to support the [suspension] order ..., even though the FDIC did not provide appellee with a separate pre-suspension hearing.

Ibid. While the discussion of this point in *Mallen* is of course dicta, it nevertheless underlines the Court's continuing recognition that due process does not necessarily require a pre-deprivation hearing under all circumstances.

B. *Loudermill* did not establish a per se rule governing suspensions of tenured public employees.

The Court of Appeals, however, invoked the Court's decision in *Cleveland Bd. of Education v. Loudermill, supra,* to justify its imposition of a blanket rule to govern all suspensions without pay of tenured public employees. Pet. App. 11a-14a. In *Loudermill*, the Court considered the due process rights of public employees facing termination of their employment, and held that, before the termination takes effect, such employees must be given at least oral notice, an explanation of the employer's evidence, and an informal opportunity to present their side of the story. *Loudermill,* 470 U.S. at 545-46. Discussing the possibility that a governmental employer might need to remove an employee immediately without a hearing — a situation not presented in *Loudermill* itself, *id.*, at 545, n.10 — the Court said that "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." *Id.*, at 545-46. The Court of Appeals thought that this language "strongly suggests" that its blanket rule is constitutionally required, Pet. App. 11a, but this greatly overstates the case.

First, the statement relied on by the Court of Appeals is, of course, dicta. In *Loudermill*, as explained above, there was no suggestion that the need to remove the employees was exigent, and the quoted language was therefore not necessary to the case's result.

Second, *Loudermill* is itself a classic restatement of the flexible *Mathews v. Eldridge* analysis. The Court in *Loudermill* not only applied the three-part *Mathews* test, *Loudermill,* 470 U.S. at 543-45, but began its discussion with the recognition that "[t]here are, of course, some situations in which a postdeprivation hearing will satisfy due process requirements." *Id.*, at 542, n. 7, *citing Ewing v. Mytinger & Casselberry Inc.*,

339 U.S. 594 (1950) and *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908). In light of this, it would be odd indeed to find that *Loudermill* had departed from *Mathews* to establish a rigid rule to be applied without exception to cases, like this one, quite unlike itself.

Third, if *Loudermill* had indeed established, or even sanctioned, such a drastic departure from *Mathews*, it would surely have been mentioned, at least in passing, by the Court in *Mallen*. But as we have seen, *supra* at 15, the Court's discussion in *Mallen*, while dicta, is quite inconsistent with any such notion.

It is surely for these reasons that most of the lower courts to have considered the point have agreed with the dissenting judge from the Court of Appeals in this case that the Court's language in *Loudermill* "is merely descriptive, not normative." Pet. App. 31a (Alito, J., dissenting), *quoting Engdahl v. Dept. of Navy*, 900 F.2d 1572, 1578 (Fed. Cir. 1990).

The Court thus did not establish any blanket rule in *Loudermill*, and it should not do so now. The Court should rather adhere to its settled recognition that the flexible requirements of due process sometimes permit the government to dispense with a predeprivation hearing. As we now demonstrate, this is one of those cases.

II. The Respondent's Suspension Without Pay Did Not Violate The Due Process Clause.

The Court of Appeals' principal error, as we have explained, was to carve out an unqualified exception to settled due process jurisprudence so as to require a hearing before a tenured public employee could *ever* be deprived of pay, however briefly. But when the *Mathews* balancing test is applied to this case without the artificial constraints of the Court of Appeals' *per se* rule, it leads to the conclusion that the respondent's brief suspension without did not violate the Due

Process Clause. Rather, this case, like *Mallen*, is one where "an important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted" and the need for prompt action, "justif[ies] postponing the opportunity to be heard until after the initial deprivation." *Id.*, 486 U.S. at 240.

1. The first factor of the *Mathews* test to be considered is the nature of the private interest — here the interest in receiving an uninterrupted paycheck.[3]

Respondent's interest in an uninterrupted salary, while not insignificant, hardly weighs as heavily in the *Mathews* balance as other interests the Court has examined. The deprivation was temporary, the period without any paycheck of brief duration, and the loss — money — easily replaceable. Certainly it is a far cry from the claim to welfare benefits which the Court in *Goldberg v. Kelly*, 397 U.S. 257 (1970) characterized as the "brutal need" of persons on the very edge of subsistence. *Id.*, at 261. And the temporary loss of salary is of less import than the permanent loss of a job, which the Court in *Loudermill* said need be preceded only by an opportunity for an employee to "meet and discuss" the situation with the decisionmaker. *Id.*, 470 U.S. at 471.

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[3]The respondent was suspended without pay on August 27, 1995. J.A. 6a-7a, 27a, 57a. He met with the Director of Human Resources on September 18, 1995, and that meeting led to his demotion to groundskeeper, conveyed to him by letter of September 23, 1995, and effective retroactively to August 26, 1995, the date of his arrest. J.A. 8a, 29a-31a, 33a, 82a. He eventually received back pay from August 25 to September 24 at his previous rate of pay. J.A. 52a-53a, 82a.

The Court of Appeals erred by concluding that because a "suspension without pay [could] not be viewed as de minimus," it should be given virtually controlling weight in the *Mathews* analysis. Pet. App. 11a-16a. In doing so, the Court of Appeals failed properly to apply decisions of this Court which recognize that even substantial private interests may be interrupted prior to a hearing. In cases involving interests at least as important as Respondent's, the Court has said that, under the appropriate circumstances, no pre-deprivation hearing is necessary. *See FDIC v. Mallen*, 486 U.S. 230 (1988) (employment as bank president); citing *Barry v. Barchi*, 443 U.S. 55 (1979) (horse trainer's license); *Dixon v. Love*, 431 U.S. 105 (1977) (license to operate a motor vehicle); *See also, Ingraham v. Wright*, 430 U.S. 651 (1977) (corporal punishment); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (seizure of misbranded food supplement); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (seizure of food). Thus, though concededly not de minimus, Respondent's interest in an uninterrupted paycheck is not sufficiently important of itself to outweigh every other factor in the *Mathews* analysis.

2. The second factor is the value of additional or substitute procedural safeguards. Here, little useful purpose would have been served by additional pre-deprivation safeguards. The administrative regulations applicable to Commonwealth employees require that an employee be suspended without pay "as soon as practicable" after being formally charged with a felony. 4 Pa. Code §7. 173, reprinted *supra* at 3.[4] This is thus not a situation like the one described by

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[4]The regulation provides in full that "[a]s soon as practicable after an employee has been formally charged with criminal conduct related to his employment with the Commonwealth or which constitutes a felony, the employe shall be suspended without pay. If

the Court in *Loudermill*. In that case, Loudermill's dismissal turned on a question of credibility — whether he had lied about prior convictions on his job application. 470 U.S. at 544 n.9.[5] In addition, Loudermill's termination, assuming that he had in fact lied, was not mandatory but discretionary with his employer. In that context, the Court observed that

> even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decision-maker is likely to be before the termination takes effect.

470 U.S. and 543. Here, by contrast, state law *required* that any employee be suspended without pay "as soon as practicable" after being charged with a felony.

Respondent's suspension thus presented no issues of either credibility or discretion. The only issues were whether he had or had not been arrested, and whether he had or had not been charged with a felony, and on these issues the information received from the State Police, as the Court of Appeals recognized, "certainly suffices to ensure that the university's concerns were not baseless or unwarranted." Pet. App. 11a. *Cf. Mallen*, 486 U.S. at 241 (grand jury indictment of bank president, although ex parte, sufficient support for pre-hearing suspension). In fact, respondent has never denied that he was arrested and charged with a felony, and so it remains quite unclear just what function could have been served by additional process.

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the charge results in conviction in a court of law, the employe shall be terminated."

[5]In the consolidated case, a school bus mechanic had been discharged because he failed an eye examination.

3. The third *Mathews* factor — the interest of the government — the Court of Appeals properly characterized as "compelling", noting that "the university has a substantial interest in maintaining public confidence in the ESU police force." Pet. App. 11a. In this, of course, the Court of Appeals was quite correct. The government's interest in promptly suspending a law enforcement officer who has been charged with a felony can hardly be characterized as less than compelling, not only for reasons of public confidence, as the Court of Appeals observed, but for obvious reasons of effective law enforcement and morale among fellow officers as well. The Court has long recognized similarly compelling governmental interests in a variety of contexts. *See e.g. Ewing v. Mytinger and Casselberry, Inc.*, 339 U.S. 594 (1950) (important government interest in protecting the public from contaminated foods); *Phillips v. Commissioner*, 398 U.S. 589 (1931) (important governmental interest in collecting the internal revenue of the United States); *Barry v. Barchi*, 443 U.S. 55 (1979) (important governmental interest in assuring the integrity of horse racing); *FDIC v. Mallen*, 486 U.S. 230 (1988) (important governmental interest in protecting integrity of, and public confidence in, banking institutions).

The Court of Appeals contended that the government's interest in such cases could always be accommodated by suspending the employee with pay pending a hearing. In other words, the government's only recourse is either to engage in a pointless hearing, or to extend a paid vacation to the affected employee. This rule hardly

> does ... justice to the state's interest in financial integrity and its interest in promptly terminating an employee who has violated the conditions of his tenure and ignores [the state's] practice of paying back wages to wrongfully - discharged employees.

Loudermill, 470 U.S. at 563 n.1 (Rehnquist, J., dissenting).

Based on the *Mathews* analysis, the judgment of the Court of Appeals should be reversed. Respondent's interest in the uninterrupted receipt of his paycheck simply does not outweigh the government's compelling interest in promptly removing a law enforcement officer who has been charged with a felony.

CONCLUSION

For these reasons, the Court should reverse the judgment of the Court of Appeals on the respondent's suspension-without-pay claim, and remand the case to that Court with directions to affirm the judgment of the District Court on that claim.

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